Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2005

WILLIE J. HORTON, JR.,

Petitioner,

v.

JUDGE JAMES AHLER, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
28 U.S.C. §2101(c)

PETITION FOR A WRIT OF CERTIORARI

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COMMISSION ON PROFESSIONAL COMPETENCE, SAN DIEGO COUNTY, EDWARD LOPEZ, SUE BRAUN, JOHN DE BECK, RON OTTINGER, FRANCES ZIMMERMAN, ALAN BERSIN, TERRANCE SMITH, KMIKO FUKUDA, MARY HOPPER, KATHERINE COFFARO, JAIME BUENSUCESCO, DEBERIE GOMEZ, TONY ALVARADO, SAN DIEGO UNIFIED SCHOOL DISTRICT

QUESTIONS PRESENTED

1. Whether a California statute, the Administrative Procedure Act (APA) Gov. Code section11524 protects a citizen's due process rights and property rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution, Title VII Racial Discrimination Claims:

a. where Congress has specified the remedies a party must exhaust as a jurisdictional prerequisite to judicial review of a class of agency actions; and

b. where the administrative agency decided by rule to make an inter-agency review process mandatory?

2. Can an administrative agency violate a party's equal protection clause of the Fourteenth

Amendment and Fifth Amendment to the United States Constitution by litigating the same party for the same cause of action:

a. where there has been a prior decision in favor of the Respondent; and

b. the agency had not requested reconsideration or an appeal by filing a petition for mandamus mandated by the California APA Gov. Code section 11524?

3. Has Respondent received due process under the Fifth Amendment of the United States Constitution due process rights of law when Respondent timely file a Title VII racial discrimination charge; and where:

a. the administrative agency and the school district denied the Respondent's application for reconsideration, and made a ruling without holding

a hearing to which the Respondent was entitled in accordance with California APA Gov. Code section 11517;

4. Were Petitioner's Constitutional rights violated according to due process clause and the equal protection clause of the Fifth and Fourteenth Amendments where:

a. the school district did not appeal the first administrative ruling, and refiled the same charges violating the APA Gov. Code section 11524; and

5. Did the Ninth Circuit Court of Appeal err in its review *de novo* of the District Court's dismissal based on *res judicata* where:

a. the second administrative law judge did not have jurisdiction to rehear the same charges and issues under the same case number that the first

administrative law judge dismissed between the parties;

b. the first administrative proceeding was not reviewed nor did the school district appeal the ruling, therefore rendering the first administrative proceeding *res judicata*; and

c. did the first administrative proceeding preclude racial discrimination claims protected under Title VII?

d. as a corollary to the above federal questions of law, did the Appellate Court properly hold that Respondent received due process where the above-described factors existed and where other Appellate Courts have ruled differently in similar cases?

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PETITION FOR WRIT OF CERTIORARI

Willie J. Horton, Jr. respectfully petitions for a Writ of Certiorari to review the Judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing (Appendix A). The decision of the Court of Appeals on the merits as found in Appendix A. The decision of the District Court addressing the exhaustion of administrative remedies issue is unreported.

JURISDICTION ON CERTIORARI

On August 4, 2005, the Ninth Circuit Court of Appeals denied the rehearing *en banc* and the petition for rehearing by the panel. *See* Ninth Circuit Rule 34A(4). The jurisdiction of this Court is

invoked under U.S.C. section1254(1) (Appendix A). The notice of appeal was filed in the District Court on August 23, 2005 (Appendix A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment due process clause, to life, liberty and the pursuit of happiness and the equal protection clause under the Fourteenth Amendment protects property rights.

The exhaustion of administrative remedies is settled law by Title V of the U.S. Code APA section 704, which allows an agency to decide by rule whether to make an intra-agency review process mandatory or permissive. If an agency makes the review process mandatory, a petitioner must exhaust it as a prerequisite for judicial review under the

California APA Gov. Code section 11524, the federal equivalent in dealing with exhaustion of administrative remedies.

LEGISLATIVE MATERIAL

APA Gov. Code section 11524 was revised in 1997 to incorporate the statutory judicial review decided by Darby v. Cisneros (1993) 509 U.S. 137; 113 S. Ct. 2539; 125 L. Ed.2d. 113.

OTHER AUTHORITIES

Duffy Administrative common law in Judicial Review, 77 Tex. L. Rev. 121, 152-62 (1998) (viewing *Darby* as a triumph of statutory judicial review (U.S. §704) over common law judicial review. Respondent/Petitioner Willie J. Horton (hereinafter "Horton") and Petitioner/Defendant San Diego Unified School District (hereinafter "District") and

Defendant Commission on Professional Competence (hereinafter "Commission")are the parties to this action. In the instant case District had to exhaust the administrative remedies mandated by the APA.

STATEMENT OF THE CASE

This wrongful termination and damages case began when the District refused to allow Horton to return to work after the Administrative Law Judge (hereinafter "ALJ") dismissed all charges against him in May 2000, and the District's motion for continuance was denied by the ALJ. The District did not appeal the ruling (See Appendix B).

1. Background

The district failed to exhaust its administrative remedies by not filing a motion for reconsideration or appeal in according to APA Gov. Code section 11524.

The administrative intra-agency review process was mandatory by its established rule. The District as the original petitioner was mandated to exhaust administrative remedies as a prerequisite for judicial review. The District failed to take any action.

Four months later, without any explanation, the District refiled the same charges with the same case number as the adjudicated ruling and with the same administrative agency. Horton objected to the refiling of the same dismissed charges, but the second ALJ concluded that Horton's objection was irrelevant to the case. The District and the Commission violated 28 U.S.C. §1738, the full faith and credit clause which provides, in part,

> "Full faith and credit shall be given in every state to the public acts, records, and judicial proceedings of every other state. And the

> Congress may by general laws proscribe the manner in which such action, records and proceedings may be proved, and the full effect thereof." (U.S.C., Art. IV, §1)

Horton filed a reconsideration petition contesting the second unlawful proceeding in violation of APA Gov. Code section111517. The school board participated in an illegal vote because Horton was denied the opportunity to present oral or written evidence under APA Gov. Code §11517(E)(ii). APA Gov. Code section 11524 barred the District from raising the same issues on judicial review. The second ALJ did not have the jurisdiction to grant continuance. Only the first ALJ had that authority: "When a hearing officer... has been assigned to such a hearing, no continuance may be granted except by him for good cause shown." (Gov. Code section

11524). Horton alleges constitutional and statutory claims against state officials who acted under color of state law, and violated federally protected rights.

The due process clause and the equal protection clause of the Fourteenth Amendment provides: "No person shall ... be deprived of life, liberty, or property without due process of law." The administrative intra-agency review process was mandatory by it's established rule. District had to exhaust all remedies as a prerequisite for judicial review.

The U.S. District Court of Southern California entered judgment for the San Diego Unified School District and the Commission on Professional Competence without addressing the jurisdictional question of APA Gov. Code section 11524. Appendix C.

The Ninth Circuit sustained the U.S. District court judgment without rendering an opinion but ruled the case was not for publication (See Appendix A). The decision rests on an erroneous view of the exhaustion of the administrative remedies statute, APA Gov. Code section 11524, conflicts with the decisions of this Court and other circuit courts. The conflict raises an important question of law warranting this Court's plenary review.

On April 2, 2005, Horton filed a timely petition for rehearing *en banc*, which under Ninth Circuit Rule 35A (4) functioned both as a petition for rehearing and a suggestion for rehearing *en banc*, and which was treated by the Ninth Circuit as such. On August 4, 2005, the Ninth Circuit Court denied the

rehearing petition without comment, except to say that no judge called for the vote (see Appendix A).

REASONS FOR GRANTING WRIT

The District attempted to hide the first administrative ruling of May 25, 2000, and they failed to appeal the first ruling. The Ninth Circuit Court of Appeals decision is flatly inconsistent with numerous decisions of other Courts of Appeal and the State Courts holding that when Congress specifies the remedies, a party must exhaust as a jurisdictional prerequisite to judicial review of a class of agency actions. Courts do not have discretion to excuse a party's failure to exhaust one of those statutorily-prescribed administrative remedies to judgements of prior proceedings. The California APA reflects the same Congressional

intent regarding the exhaustion of administrative remedies as the Federal APA which governs federal administrative agencies.

If permitted to stand, the Ninth Circuit's ruling would provide wrongdoers with a blueprint for using discretion where Congress specified that the courts could not use discretion. The Court of Appeal's decision instructs wrongdoers that they need only to hide a ruling if they failed to appeal. The Ninth Circuit's decision fundamentally refused to interpret the APA Gov. Code section 11524 requirements of exhaustion by statute. As this Court has explained, the statute "directs all courts to treat a state court judgment with the same respect."

Horton is relying on the following cases because they present facts and conclusions of law that

support the instant case. In *Clausen v. Espy* 42 F.3d 1522 (9th Cir. 1994), the Court held that the petitioner under the APA exhaustion doctrine had to appeal to a "superior agency authority" as a prerequisite to judicial review when expressly required by statute or when an agency rule requires appeal before review and the administration action is made inoperative pending that review. In the instant case, the Ninth Circuit sustained the District Court ruling even though District was required to appeal the first administrative proceedings.

In *Coteau Properties v. Department of Interior* 53 F.3d 1466 (8th Cir. 1995), the Court held that plaintiff was required to exhaust administrative remedies before petitioning for judicial review of the FAD. In the instant case District was mandated by

the California APA to exhaust all administrative remedies before it refiled the same dismissal charges. In *Darby* the Court held that only administrative appeals mandated by statute or by agency rule need be pursued before seeking judicial review of an agency decision. The Court did not have authority to require exhaustion of remedies before reviewing HUD administrative action under the APA, where exhaustion was not mandated by statute or agency rule. In the instant case, the California APA Gov. Code section 11524 was mandated by statute and agency rule to exhaust all administrative remedies.

In *Dixie Fuel Co. v. Commission of Social Security* 171 F.3d 1052 (6th Cir. 1999), the Court held that the doctrine of exhaustion of administrative remedies

is mandated to that which the statute or rule clearly mandates according to *Darby*. In *Dickinson v. Petroleum Conversion Corp.* (1950) 331 U.S. 507, the Court held that pending a definite ruling on the matter, it is best to seek review of the first judgment whenever its finality is a reasonable possibility, and, if unsuccessful, to bring up the second judgment. Because the "finality" of a state court judgment is a jurisdictional requirement, any party can raise a finality issue at any stage of the proceedings in the Supreme Court. Preferably, such an issue should be raised and discussed in the certiorari petition and response thereto, but if the parties fail to identify or discuss a finality problem, the court itself can raise and dispose of the matter at any juncture. In *Duguene Light Co. v. Barasch* (1989) 488 U.S. 299,

306, the Court inquired into and resolved a finality problem, "although the parties have not discussed it." Only after satisfying itself that the State Court ruling was truly final did the Court proceed to resolve the Federal Constitutional issues at stake.

In *Glisson v. U.S. Forest Service* 55 F.3d 1327 (7th Cir. 1995), plaintiff appeared *pro se*, the Court dismissed plaintiff's case on the ground that defendant had failed to exhaust his administrative remedies. The Court dismissed with prejudice because it was too late for plaintiff to cure the problem that had caused the dismissal. The doors of the administrative agency were closed to him because of his failure to file a timely appeal to the Regional Forester. In the instant case, the doors for District were closed at the time it refiled the

dismissed charges in the second administrative proceeding.

In *Howell v. INC* 72 F.2d 290 (2nd Cir. 1995), the Court ruled pursuant to the Supreme Court's holding that under the Administrative Procedures Act, the doctrine of exhaustion applies "only when expressly required by statute or when an agency rule required appeal before judicial review and the administrative action is made inoperative pending that review."

In *Kremer v. Chemical Const. Corp.* (1982) 102 S. Ct. 1883, the Court held that final state court judgments are entitled to full faith and credit in Title VII action, but indicated that unreviewed determinations by state agencies do not preclude trial *de novo* in federal court on Title VII claims.

In *Marine Mammal Conservancy v. Department of AGR* 134 F.3d 409 (10th Cir. 1998), the Court held "that the administrative judge's decision denying plaintiff leave to intervene is now 'final'; it became such under §1.142(c)(4) of the regulations because plaintiff did not file an administrative appeal.

In *McCarthy v. Madison* (1992) 503 U.S. 140; 112 S. Ct. 1981; 196 L. Ed.2d 291, the Court held "of paramount importance" to any exhaustion inquiry is the Congressional intent" citing *Patsy v. Board of Reagents of Florida* (1982) 457 U.S. 496, 501; L. Ed.2d 172; 102 S. St. 2557. "We therefore must consider whether §200, by providing the conditions under which agency action becomes 'final' for the purposes of judicial review, limits the authority of courts to impose additional exhaustion requirements

as a prerequisite to judicial review. The Court further held exhaustion serves the twin purposes of protecting the administrative agency authority and promoting judicial efficiency. Where Congress specifically mandates, exhaustion is required.

In *Southern Ohio Coal v. Office of Surface Min.* 20 F.3d 1418 (6th Cir. 1994), the Court held that:

> Given that SOCCO has failed to exhaust its administrative remedies and that no exception to the exhaustion doctrine applies, we hold that the District Court erred in exercising jurisdiction over OSM under section 1276(c). We further hold that the court did not have jurisdiction to enjoin enforcement of the OSM cessation order.

In the instant case, the District Court did not have jurisdiction to grant District and Commission a summary judgment. In *University of Tennessee v. Robert R. Elliott* (year) 478 U.S. 788; 106 S. Ct. 3220, the Court held that the decision rendered in state administrative proceedings and not reviewed by the state court did not have preclusive effect on university employee's Title VII racial discrimination claims and theirs did not preclude trial *de novo* on these claims in federal district court. Civil Rights Act 1964 §719 *et seq.*; §706 as amended; 42 U.S.C.A. §2000(e) *et seq.*, 2000(e)-5(b).

The long and short of it is that the decision plainly collides with this Court's interpretation of the key constitutional foundation of discriminatory application of the law, and review should be granted

for that reason alone. The error is so palpable, moreover that Horton suggests this is one of those exceptional cases in which summary reversal would be in order. The issue is not one that will benefit by further consideration by lower courts.

CONCLUSION

The decision collides so squarely with this Court's decisions and threatens such mischief that review should be granted, with summary reversal an appropriate disposition. If, on the other hand, there might be basis for such a differentiating certiorari

should be granted for plenary review of this question, which would surely be an important one.

Respectfully Submitted,

Date: 12/10/05

Willie J. Horton, Jr., Pro Se

Filed August 23, 2005

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE J. HORTON, JR.,	No. 04-5589
Plaintiff	D.C. No. CV-03-02007-MLF
v.	Judge Marilyn Huff
JAMES AHLER, COMMISSION ON PROFESSIONAL COMPETENCE, SAN DIEGO COUNTY, EDWARD LOPEZ, SUE BRAUN, JOHN DE BECK, RON OTTINGER, FRANCES ZIMMERMAN, ALAN BERSIN, TERRANCE SMITH, KMIKO FUKUDA, MARY HOPPER, KATHERINE COFFARO, JAIME BUENSUCESCO, DEBERIE GOMEZ, TONY ALVARADO, SAN DIEGO UNIFIED SCHOOL DISTRICT and DOES 1-20	

NOTICE IS HEREBY GIVEN that Willie J. Horton, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge 9th circuit court of appeals, dismissing the complaint entered in this action on August 5, 2005.

APPENDIX A-21

This appeal is taken pursuant to 28 U.S.C. §1253 (or other relevant statute].

Respectfully submitted,

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Filed April 11, 2005

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE J. HORTON, JR.,	No. 04-5589
Plaintiff-Appellant	D.C. No. CV-03-02007-MLF
v.	**MEMORANDUM***
JAMES AHLER, Judge; et al.,	
Defendants-Appellees	

Appeal from the United States District Court
for the Southern District of California
Marilyn Huff. Marilyn L. Huff, District Judge,
Presiding

Submitted April 4, 2005**

Before: KOZINSKI, HAWKINS, and CLIFTON, Circuit Judges.

Willie J. Horton, Jr. appeals pro se the district court's order dismissing his 42 U.S.C. § 1983 action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a district court's dismissal based on res judicata, *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997), and we affirm.

The district court properly concluded that res judicata bars Horton's current action because a final

judgment on the merits was entered in Horton's prior district court action in which he could have raised the instant claims. See *Headwaters, Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1052 (9th Cir. 2005) citing *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001).

All pending motions are denied. Appellant's request for judicial notice is denied. AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Filed August, 4, 2005

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE J. HORTON, JR.,	No. 04-5589
Plaintiff-Appellant	D.C. No. CV-03-02007-MLF
v.	**ORDER**
JAMES AHLER, Judge; et al.,	
Defendants-Appellees	

Before: KOZINSKI, HAWKINS, and CLIFTON, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

Appellant's request for publication is denied.

No further filings shall be accepted in this closed appeal.

APPENDIX B-25

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE,
SAN DIEGO UNIFIED SCHOOL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

In the Matter of the Dismissal of	)	
WILLIE HORTON, JR.,	)	OAH L-2000030303

NOTICE OF RULING ON MOTION

. . .

At the conclusion of oral argument on May 22, 2000, both parties were given the opportunity to file further argument on the Motion until the closed of business on May 23, 2000.

On May 23, 2000, Horton filed by fax transmission HORTON'S SUPPLEMENTAL AUTHORITIES REGARDING WHETHER THE ADMINISTRATIVE TRIBUNAL MAY ISSUE AN ORDER NUNC PRO TUNC. This was marked for identification as Respondent's Exhibit C.

The parties' positions are amply stated in the papers filed. Horton claims that the District failed to provide him with a hearing within 60 days of his

demand for hearing pursuant to Education Code section 44944 and that this failure constitutes a jurisdictional defect that cannot be remedied. The District claims alternatively, 1) that the actual date of the request for hearing is April 3, 2000 and not February 28, 2000, and that the hearing will commence within the statutory time since it is set to begin on June 1, 2000; and 2) that the Office of Administrative Hearings has the authority to grant a continuance of the hearing and that such a grant of a continuance under Education Code section 44944(a), would extend the time for the commencement of the hearing.

When the arguments are reduced to their essence, the issue is quite straightforward. Under the facts of this case, does the District's failure to provide Horton with a hearing within 60 days of his request for hearing constitute a jurisdictional defect that cannot be remedied?

Although the District argues otherwise, the operative date on which Horton requested a hearing

is February 28, and the Education Code required that the District afford him a hearing on the charges within 60 days. The 60th day from Horton's February 28, 2000 request for a hearing was April 28, 2000.

Willie Horton is a permanent classified and certificated employee of the District and is currently assigned as principal of the District's alternative school, Youth Opportunity Unlimited.

On February 1, 2000 the District served Horton, pursuant to Education Code section 44934, with Dismissal Charges alleging that cause existed to dismiss Horton from his employment as a principal. Horton requested a hearing on February 28, 2000. On March 21, 2000, Horton was mailed a Notice of Case Setting from the Office of Administrative Hearings setting the case for hearing on June 1st and 2nd. On March 29, 2000, Horton's attorney received an Accusation from the District and on April 3, 2000 Horton's attorney filed a Notice of Defense.

A foundational premise of the administrative process is the belief that the public interest is best

served by a process that is speedy and efficient and not burdened by too many technical rules. That is why the rules of evidence are generally related and there are far fewer technical defenses available. The notion is that in matters that are colored with the public interest (and occupational licensing clearly meets this standard) hearings on the merits are the preferred method of resolving disputes.

In a sense, this is what the District argues. The District claims the charges against Horton are very serious and, because of this, the public interest requires that a hearing on the merits be conducted. Further, the District argues that the Office of Administrative Hearings (OAH) has the power to fashion relief that will insure that this matter be heard on the merits.

Although all courts have certain powers inherent in their nature, each court has enumerated powers that flow from the constitution or from legislation. These enumerated powers determine the scope of a court's authority to act. The District argues that

OAH has the power to grant a continuance of the hearing nunc pro tunc to a date within the original 60 day window thus extending the time to commence the hearing. This is a most interesting argument but one which vests power in this Court that is beyond its jurisdiction.

There are three cases that must be read in conjunction with Education Code section 44944. They are 1) *Governing Board of the Palos Verdes Peninsula Unified School District v. Felt* (1976) 55 Cal.App.3d, 156, 2) *Powers v. Commission on Professional Competence* (1984) 157 Cal.App.3d 560, and 3) *Wilmot v. Commission on Professional Competence* (1998) 64 Cal. App.4th 1130. Education Code section 44944(a) reads in relevant part:

> In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing.

None of the cases cited either directly or by implication allow this administrative tribunal to cure this fatal procedural defect. These cases do stand for the proposition that the term "shall be commenced" in Education Code section 44944(a) is mandatory. Further, the parties, according to these cases, have the power, should they jointly feel the need for more than 60 days to prepare for hearing, to extend the time by stipulating that the necessary ceremonial of opening the record has been observed. Also, if a continuance is granted pursuant to Government Code section 11524, the time to commence the hearing shall be extended for a period equal to such continuance.

Here, no such action took place during the critical 60 day period. There was no waiver by the parties; there was no stipulation; there was no opening of the record to satisfy the jurisdictional requirement of Section 44944.

The District's attorney chose the trial date of June 1 and 2 to satisfy the calendaring needs of the

attorney. That is clear from the Declarations of Janice Brown, Esq. and paralegal Stella Neuman.

The District's Motion for Continuance cannot be granted when it is made for the first time after the expiration of the 60 day period within which to commence the hearing, This administrative tribunal has no such power to revive that which has been extinguished by granting a Motion for Continuance Nunc Pro Tunc.

The Education Code is clear with respect to the mandatory, not permissive, requirement to commence such a hearing within 60 days of respondent's request. The cases that interpret and explain the meaning of the statute are, likewise, clear. There is no room for doubt.

By granting the relief requested by the District, the Administrative Law Judge (ALJ) would be turning the Education Code on its head and in effect, rewriting it. All counts and judges have some discretion to interpret the laws. However, an ALJ at this level of judicial review does not have discretion

to rewrite the Education Code and create a new and novel way to avoid the clear and unambiguous language of Education Code section 44944,

The Motion to Dismiss filed by respondent Horton is granted. The District's Motion for Continuance is denied

IT IS SO ORDERED.

Dated: May 25, 2000

STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings

File Stamped April 12, 2004

UNITED STATES DISTRICT COURT

SOUTHERN CALIFORNIA

WILLIE J. HORTON, JR., Plaintiff v. JAMES AHLER, COMMISSION ON PROFESSIONAL COMPETENCE, SAN DIEGO COUNTY, EDWARD LOPEZ, SUE BRAUN, JOHN DE BECK, RON OTTINGER, FRANCES ZIMMERMAN, ALAN BERSIN, TERRANCE SMITH, KMIKO FUKUDA, MARY HOPPER, KATHERINE COFFARO, JAIME BUENSUCESCO, DEBERIE GOMEZ, TONY ALVARADO, SAN DIEGO UNIFIED SCHOOL DISTRICT and DOES 1-20, Defendants.	CASE NO. CV-03-02007-H(NLS) **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND TERMINATING CASE**

. . .

The District served Plaintiff on September 29, 2000, with another notice of dismissal based on the same charges. Pursuant to applicable statutes, the District filed an administrative accusation on November 13, 2000. On November 21, 2000, Plaintiff

exercised his right to request a hearing challenging his dismissal before the Commission on Professional Competence. The Commission held the hearing on February 8, 9, 13, 14, and 16, 2001, before Commission Members Kindy Stumpp, Alan S. Sachrison, and Administrative Law Judge James Ahler. The parties were given the opportunity to present evidence, examine and cross-examine witnesses, and make arguments based on the evidence at the five day hearing. On March 15, 2001, the Commission issued a 27-page decision in which it found that the District's decision to dismiss Plaintiff was supported by a preponderance of the evidence, and in which it found that Plaintiff had not established that he had been subjected to discrimination or retaliation

. . .

In the current action, Plaintiff has filed a new Complaint which makes the same allegations as his prior complaints in state and federal courts. Plaintiff

is barred from seeking to relitigate these claims by the doctrine of res judicata.

Federal courts adhere to the doctrine of res judicata, which directs that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCunv*, 449 U.S. 90, 94 (1980); *Whaley v. Rydman*, 887 F.2d 14 976, 978 (9th Cir. 1989) ("[o]nce a court has entered a final judgment on the merits, res judicata bars a subsequent action between the same parties over the same cause of action); *Davis & Cox v. Summa* 16 Corp.,751 F.2d 1507, 1518 (9th Cir. 1985)9 in part superceded by statute, 842 F.2d 1154 (9th Cir. 1988) ("[a] final judgment on the merits bars a subsequent action between the same parties or their privies over the same cause of action ... [and] prevents litigation of all grounds and defenses that were or could have been raised in the action"). The Supreme Court has explained that the purpose of res judicata is to "relieve parties of the cost and vexation

of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v, McCurry 449 U.S. at 94.

(3)

Supreme Court, U.S.
FILED
MAR 31 2006
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No. 05-1094

In The
Supreme Court of the United States

WILLIE J. HORTON, JR.,

Petitioner,

v.

JUDGE JAMES AHLER, COMMISSION ON PROFESSIONAL COMPETENCE, SAN DIEGO COUNTY, EDWARD LOPEZ, SUE BRAUN, JOHN DE BECK, RON OTTINGER, FRANCES ZIMMERMAN, ALAN BERSIN, TERRANCE SMITH, KIMIKO FUKUDA, MARY HOPPER, KATHERINE COFFARO, JAIME BUENSUCESCO, DEBERIE GOMEZ, TONY ALVARADO, SAN DIEGO UNIFIED SCHOOL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI

WILLIE J. HORTON, JR.
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INTRODUCTION

The decision of the Ninth Circuit should not be allowed to stand because it incorrectly suggests that governments have the right to exclude whole classes of citizens from the exercise of a set of Constitutional rights simply because of their race, gender or age. This case involves Title VII claims because Petitioner filed a charge of discrimination (charge number 345A00536) in November 1999 against the San Diego Unified School District ("District") approximately five months before the administrative agency ruling.

The discrimination claims (Title VII) were being investigated by the Equal Employment Opportunity Commission (EEOC) at the time of the first Administrative Tribunal ruling. (See Appendix "A", App. 1) Petitioner also filed a discrimination complaint on December 11, 2000 in the United States District Court, Southern District of California, Case No. 00-CV-2450-H (JSF). The District retaliated against Petitioner by hiding the first administrative ruling and terminating his employment as a high school principal.

Respondents' actions caused confusion in the State and Federal courts by hiding the first ruling by using the same case number when refiling the same charges.

REASONS FOR GRANTING THE WRIT

The District and the Commission on Professional Competence ("Commission") violated the Administrative Procedural Act (APA) which is settled law under the California APA Government Code section 11524.

The first administrative ruling was a final and non-discretionary action subject to judicial review, and the ruling adversely affected the District.

Petitioner asks this Court to enforce the finality requirement because the two conditions have been met. In *Pinho v. Gonzalez,* 423 F.3d 193 (3rd Cir. 2005), the finality requirement was used as follows:

1. The action marked the "consummation" of the agency's decision-making process. *Chicago & Southern Airlines v. Waterman S.S. Corp.,* 333 U.S. 103 (1948).

2. The action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71, 91 (1970); *Bennett v. Spear,* 520 U.S. 154, 178 (1997). The agency ruling at issue before this Court satisfies the above-conditions to meet the finality requirements.

In *Norton v. Southern Utah Wild. Al.,* 159 L.Ed.2d 137 (2004), the Court looked at what limits the APA places upon judicial review of agency action. The APA authorizes suit by a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute. This Court also referred to the Attorney General's Manual on the APA, a document whose reasoning has been pervasive. See, e.g., *Darby v. Cisneros,* 509 U.S. 137 (1993).

This Court has never addressed the issue of two different administrative rulings under the same case number where the first ruling was not appealed according to the APA statute, Gov. Code section 11524(c).

The District, its counsel and the Commission were disingenuous in hiding the fact that there was a ruling on May 25, 2000 that dismissed the case against Petitioner. It is reprehensible conduct and unbecoming to attorneys not to disclose to the court the full facts.

The District and the Commission violated Petitioner's due process by holding a second administrative hearing on the same charges.

CONCLUSION

The Court should grant this Petition to correct a gross miscarriage of justice, and to enforce the Equal Protection clause under the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A

RESPONSE TO EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S NOTICE OF CHARGE OF DISCRIMINATION AND REQUEST FOR INFORMATION

CHARGE NUMBER: 345A00536

Charging Party: Willie Horton
Respondent: San Diego Unified School District

Please be advised that Respondent ("District") has not completed its investigation of all the facts relating to charging party's claims. This preliminary response reflects the District's position, at this time, but does not prohibit the District from supplementing or amending this response at a later date.

A. REQUEST FOR INFORMATION:

1. Correct name and address of the facility named in the charge.

Response: San Diego Unified School District
Administrative Offices
4100 Normal Street
San Diego, California 92103

2. Supply an organizational chart, statement, or documents, which describe your structure, indicating, if any, the relationship between it and superior and subordinate establishments within the organization.

Response: See exhibit A, the District's organizational chart, as provided on its web-page www.sandi.net. Further organizational information is available on the web page.

3. State whether your organization has a contract with any agency of the federal government or is a subcontractor on a project, which receives federal funding. Is your organization covered by the provisions of Executive Order 11246? If your answer is yes, has your organization been the subject of a compliance review by the OFCCP at any time during the past two years?

Response: The District does receive federal funding in certain instances, but is not governed by Executive Order 11246.

4. Submit a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge.

Response: See Exhibit K (audit procedures), L (disciplinary, involuntary reassignment procedures/leave procedures) attached hereto.

6. Submit copies of all written rules relating to employee duties and conduct. Explain how employees learn the contents and rules.

Response: See Exhibits G, I, K, L and M. Employees learn the rules by extensive training.

7. List all employees who committed the same or substantially similar offense(s) that the charging party committed and the disciplinary action taken against them. Supply backup documentation for the list. Include name, position, title, race, and indicate if the employee has made an internal or external complaint of discrimination.

Response: There are other District employees who have committed the same or substantially similar offenses as Horton. When presented with their offenses, these employees either voluntary [sic] resigned, in many instances, or were terminated. The District is unable to provide the names of these third parties without violating their privacy rights.

8. List all the administrators who have been subjected to unannounced audits, involuntary reassignments, placed on personal and/or on administrative leave within the relevant time period. For each employee, include employee name, position, title, race, reason(s) for, date(s) of action(s), and indicate if the employee has made an internal or external complaint of discrimination.

Response: The District is not able to provide the information requested herein due to the privacy of third parties not involved in this action. Nonetheless, the District responds that all managerial District employees are aware that the District has the right and the responsibility to audit a school if misconduct is discovered. In addition, all schools are routinely audited. Horton's terms and conditions of employment did not "change" pursuant to the District's decision to audit. (See audit policies attached hereto as Exhibit K.)

PERSON(S) PREPARING RESPONSE:

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Signature: _____ Dated: May 31, 2000

(2)

No. 05-1094

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLIE J. HORTON, JR.,

Petitioner,

v.

JUDGE JAMES AHLER, COMMISSION ON PROFESSIONAL COMPETENCE, SAN DIEGO COUNTY, EDWARD LOPEZ, SUE BRAUN, JOHN DE BECK, RON OTTINGER, FRANCES ZIMMERMAN, ALAN BERSIN, TERRANCE SMITH, KIMIKO FUKUDA, MARY HOPPER, KATHERINE, COFFARO, JAIME BUENSUCESCO, DEBERIE GOMEZ, TONY ALVARADO, SAN DIEGO UNIFIED SCHOOL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

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INTRODUCTION

Petitioner, Willie J. Horton, Jr., respectfully moves this Court for an Order vacating its denial of the Petition for Writ of Certiorari entered May 1, 2006 and allowing this petition to go forward.

This Court should grant Horton's petition for rehearing in light of granting the petition for certiorari in *Timothy Booth, Petitioner v. C.O. Churner, et al.*, 531 U.S. 956 (2000). This case raised the identical question of exhaustion of administrative remedies as does Horton's.

In *Booth*, before resorting to federal court, Booth filed an administrative grievance but did not seek administrative review after the prison authority denied relief. Booth's failure to appeal administratively led the District Court to dismiss the complaint without prejudice for failure to exhaust administrative remedies under 42 U.S.C. §1997e(a). The Third Circuit affirmed and rejected Booth's argument that the exhaustion requirement is inappropriate to his case because the administrative process could not award him the monetary relief he sought (money being the only relief still requested).

This Court granted certiorari to address the conflict among the circuits.

Horton respectfully asks the Court for the same consideration. The instant case involves the construction and application of the Administrative Procedures Act, California Government Code section 11524. ("APA").

There is a conflict of the appellant decision rendered by the District Court and affirmed by the Appeals Court concerning applicable statutes which superceded section 11524. The District Court was faced with an administrative

procedures act which prohibited the San Diego Unified School District (SDUSD) from refiling the same charges after its motion for a continuance was denied in Office of Administrative Hearing, Case No. L-2000030303 was denied. The Court of Appeals affirmed the ruling.

This was a grievous legal error by the District Court. The Court held SDUSD served a petition on September 29, 2000 with another notice of dismissal based on the same charges pursuant to the applicable statutes. APA regulations state that the regulations specify the procedures by which the Office of Administrative hearings conducts matters before it, stating in part, "When a statute is in conflict with or inconsistent with these regulations, the statute shall take precedence." The applicable statute the District Court is referring to is in conflict with the challenged APA statute, California Government Code section 11524. SDUSD did not go beyond the first step. It did not seek intermediate or final administrative review after the first administrative law judge dismissed the charges against Horton, and denied its motion for a continuance.

SDUSD's failure to avail itself of the later stages of the administrative process should have led the District Court to find for Horton. Time is long past for SDUSD to pursue its normal administrative remedies; therefore, it cannot cure the defect in its complaint on which the first administrative law judge based his dismissal.

In *Booth*, before the ruling of the pre-amended §1997e(a) in *McCarthy v. Madigan*, 503 U.S. 140 (1992), the Court did not require exhaustion of remedies by those seeking only monetary damages when money was unavailable at the administrative level. The amendment eliminated both the discretion to dispense with administrative

exhaustion and the condition that the remedy be "plain, speedy, and effective" before exhaustion could be required.

In *McCarthy* the Court held "of paramount importance" to any exhaustion inquiry is the Congressional intent, citing *Patsy v. Board of Regents of Florida* (1982) 456 U.S. 496; 501; L. Ed.2d 172; 102 S. Ct. 2557. The Court further held exhaustion serves the twin purposes of protecting the administrative agency's authority and promoting judicial efficiency. Where Congress specifically mandates, exhaustion is required.

REASONS FOR GRANTING THE PETITION FOR REHEARING

Horton is the aggrieved party complaining about violations of federal law and the United States Constitution and petitions this Court for a rehearing. Horton's termination as a tenured teacher must comply with the provisions of the California Administrative Procedures Act, Cal. Govt. Code section 11500-11528, *et seq.*

CONCLUSION

Petitioner respectfully submits that this Court granted the petition for writ of certiorari in *Booth*, and it should likewise grant this petition for rehearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As pro se Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44(2) of the Rules of this Court.

WILLIE J. HORTON, JR.